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No. 92-1334

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STEVEN WYNNE,
Petitioner,

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 22, 1993

QUESTION PRESENTED

Whether the court of appeals properly affirmed the federal district court's allowance of summary judgment to a medical school, in a case brought by a former student under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, seeking damages, reinstatement to medical school, and accommodation of his dyslexia by altering the method and nature of the medical school's examinations, where the undisputed facts demonstrated that:

1. the student had not informed the medical school of his dyslexia;

2. the student had passed written multiple choice exams, but failed biochemistry three times;

3. the medical school had accommodated the student's academic difficulties in various ways; and

4. the medical school's professional educators had concluded that in their professional academic judgment further accommodation would not be feasible and would lead to a lowering of academic standards?

RULE 28.1 LIST

Tufts University School of Medicine is a School within Tufts University, the corporate name of which is Trustees of Tufts College, a Massachusetts non-profit, charitable corporation. Trustees of Tufts College owns all of the stock of the following Massachusetts for-profit corporations: TUDC, Inc. (a development corporation), Tufts Biotechnology Corp. (a development corporation), and Walnut Hill Properties Corp. (a real estate corporation).

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TUFTS UNIVERSITY SCHOOL OF MEDICINE,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Tufts University School of Medicine ("Tufts" or "the Medical School") submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Steven Wynne ("Wynne").

OPINIONS BELOW

The lower courts' opinions are accurately listed in Wynne's petition, at 1-2, and are accurately set out in Wynne's Appendix, at 1-124. The court of appeals' opinion from which review is sought is reported at 976 F.2d 791 (1st Cir. 1992).

JURISDICTION

Tufts does not contest this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in Wynne's petition, at 3, Tufts cites:

U. S. CONST. AMEND. I

"Congress shall make no law . . . abridging the freedom of speech. . . ."

SUMMARY OF REASONS FOR DENYING THE PETITION

Petitioner Steven Wynne, who was dismissed for poor academic performance at Tufts Medical School, seeks review of the court of appeals opinion, 976 F.2d 791 (1st Cir. 1992), which affirmed the district court's allowance of summary judgment to Tufts, after remand and following extensive review and analysis of Wynne's performance at Tufts Medical School. Wynne's claim, brought under 29 U.S.C. § 794, is that Tufts discriminated against him because he is dyslexic. Wynne contends that his dyslexia prevents him from passing written, multiple choice examinations, and that Tufts is obligated to change its course examinations in order to accommodate his learning disability. After extensive legal proceedings below, producing three district court and three court of appeals opinions, the district court and the court of appeals ultimately concluded that there was no genuine issue of material fact, and that Tufts had discharged whatever obligation it had to accommodate Wynne. This Court should decline to review the latest court of appeals opinion.

Wynne failed eight of fifteen courses in the 1983-1984 academic year at Tufts. Overriding committee recommendations that Wynne be dismissed, Dean Henry Banks arranged

for neuropsychological testing for Wynne. These seventeen tests and behavioral observations disclosed no specific learning disability, but did disclose severe deficiencies in Wynne's abilities, including reading, assimilation, understanding, retention, and retrieval of complex factual information. Dean Banks decided to give Wynne a second chance. In his second attempt to pass the first year curriculum, Wynne was given untimed examinations, provided with taped lectures and tutors, and was given numerous study suggestions. Wynne again failed pharmacology and biochemistry. In Wynne's final make-up examinations, he failed biochemistry, a required course at Tufts. Two committees then recommended dismissal and Dean Banks agreed, dismissing Wynne from the Medical School in September 1985.

Although Wynne complains that he is dyslexic, the record evidence demonstrates that the word "dyslexia" was never used while Wynne was a student at Tufts. Nonetheless, Tufts did provide numerous accommodations to Wynne, including study aids, tutors, second and third chances, and untimed examinations.

In its earlier *en banc* opinion, 932 F.2d 19, the court of appeals set forth guidelines which it believed Tufts would have to satisfy on remand in order for the district court to determine whether Tufts had reasonably accommodated Wynne, had reviewed possible alternatives, and had acted in good faith. The court of appeals stated that if, on remand, Tufts proved that it had considered alternatives, and had come to a rational conclusion that further accommodation was not feasible or would lower academic standards, Tufts would prevail. Ultimately, according to the court of appeals, the question was whether Tufts had made a reasoned, professional academic judgment in dismissing Wynne.

On remand, Tufts' submissions answered the court of appeals' questions and met the court's standards. The district court found that Tufts had demonstrated that alternatives to written, multiple choice examinations were not feasible and were too subjective, that Tufts had made a professional academic judgment that further accommodation was not feasible, and that Tufts had, in fact, reasonably accommodated Wynne. The court of appeals affirmed, 976 F.2d 791, finding the facts to be "idiosyncratic." *Id* at 796.

This case does not present an important federal question warranting review. The facts are unique, and this type of claim may never be repeated. There is no evidence to suggest that Wynne had a disability-induced inability to take and pass written, multiple choice examinations. He in fact passed many such examinations. But he failed biochemistry three times. Nor had he ever disclosed that he had dyslexia.

There is no split in the circuits which warrants review. The court of appeals opinion did not reflect that the court was in disagreement with any other circuit court. Therefore, consistently with this Court's practice, *McCray v. New York*, 461 U.S. 961, 963 (1983), this Court should deny the petition for a writ of certiorari and let the law develop in the lower courts, if it does, to the point where legal issues are clearly presented in unambiguous records.

This case does not present a sufficiently clear record upon which to base changes in fundamental legal standards. The record is fact-intensive. Although Wynne seeks to present himself as the champion of the rights of disabled students, the record does not permit such a characterization. During Medical School, he repeatedly pointed to factors having nothing to do with any disability as causing his poor academic performance. He never disclosed his dyslexia. He passed written, multiple choice exams. He never presented a specific request

for an alternative to written, multiple choice exams. On this record, then, this Court would not be in good position to analyze relevant legal issues and formulate new legal standards.

Finally, the lower courts did not address an alternative basis for summary judgment which Tufts presented, based on governing federal regulations, 45 C.F.R. § 84.44, which state that academic institutions generally need not alter their course examinations at the behest of disabled students. Schools must do so if the disability involves a "sensory, manual, or speaking" skill, except where such skills are the factors that the test purports to measure. In this case, Wynne's non-disclosed disability, dyslexia, is not "sensory," and Tufts therefore need not alter its course examinations. In any event, even if dyslexia were sensory, Wynne's difficulties with reading, assimilation, and recall of facts are among the factors that the written, multiple choice exams purport to measure. Therefore, the regulations would not require any alteration in the examinations. The lower courts did not address this independent basis for summary judgment.

STATEMENT OF THE CASE

Wynne's Statement of the Case does not fairly set forth the case and the facts. Tufts therefore submits the following:

A. The Proceedings Below

Wynne filed suit in 1988 in Massachusetts Superior Court (App. 1a)[1] alleging that Tufts violated the Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C. § 794. Tufts dismissed Wynne after he had failed to pass the first year curriculum, despite three attempts and academic assistance provided by

[1] "App." refers to Tufts' Appendix attached hereto. "Pet. App." refers to Wynne's Appendix filed with his petition.

Tufts.[2] Wynne's Complaint seeks reinstatement to Tufts Medical School, modified testing procedures for his course work at Tufts Medical School, and damages of $500,000.

Tufts removed the case. The district court initially denied Tufts' motion for summary judgment. Pet. App. 123-124. The court then reconsidered and entered summary judgment for Tufts on May 17, 1989. Pet. App. 121-123. Wynne appealed, and a three judge panel reversed and remanded to the district court. Pet. App. 77-114. The court of appeals granted Tufts' *en banc* petition on August 21, 1990. Pet. App. 115-116.

In its *en banc* ruling, the court of appeals established guidelines under which the district court must make the threshold decision as to whether Tufts' actions constituted "reasonable accommodation." *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991)(*en banc*).[3] The court also asserted the need for additional information about multiple choice examinations, their history, use, and decisions concerning them at Tufts. *Id.* at 27-28.

On remand, Tufts submitted Wynne's entire academic record and extensive affidavits from Tufts' deans and Wynne's medical school professors, detailing all of Tufts' decisions regarding Wynne, the reasons for those decisions, and the history and use of multiple choice tests at Tufts. Pet. App. 277 (Feinblatt Aff.), Pet. App. 246 (Stollar Aff.), App. 15a (Krinsky Supp. Aff.), App. 17a (Chase Second Supp. Aff.), App. 19a (Lewis Aff.), Pet. App. 292 (Banks Supp. Aff.), Pet. App. 184 (Banks Aff.), Pet. App. 205 (Chase Aff.), App. 21a (Chase Supp. Aff.), App. 24a (Krinsky Aff.).

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[2] Wynne filed a complaint with the United States Department of Education Office for Civil Rights. The Government's investigation revealed no discrimination. App. 10a.

[3] The court of appeals also entered judgment for Tufts on a Massachusetts Civil Rights Act claim, 932 F.2d at 28, which is no longer at issue.

Judge Zobel again granted summary judgment for Tufts on March 2, 1992. Pet. App. 116. Applying the court of appeals' guidelines, Judge Zobel determined (1) that Tufts' submissions demonstrated that alternatives to written multiple choice exams were not feasible and were too subjective; (2) that Tufts made a professional academic judgment that further accommodation was not feasible; and (3) that Tufts had reasonably accommodated Wynne. Pet. App. 118-121. Wynne again appealed.

B. Statement of Facts

In 1982, Wynne was accepted at Tufts Medical School, after having been rejected by Tufts and numerous other medical schools when he had previously applied in 1978 and 1980. Pet. App. 153-158. Wynne's academic credentials and MCAT scores were well below Tufts' standards.[4]

Wynne experienced immediate academic difficulties at Tufts. Based on Wynne's weak performance in biochemistry in the fall of 1983, the Medical School offered him the opportunity to defer taking the biochemistry final examination so that he would have a better chance of passing. Pet. App. 279-280. Wynne refused this accommodation. Pet. App. 279, 280.

Wynne failed eight out of fifteen courses during his first year. Pet. App. 189. Consistent with the Association of American Medical Colleges guidelines, Tufts Medical School provides for dismissal after five course failures. In 1984, both

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[4] Tufts admitted him under its affirmative action program. Pet. App. 206. Tufts offers this fact, not to suggest Wynne was somehow not a full-fledged student, but to prove that Tufts never had any discriminatory animus against Wynne. On the contrary Tufts, unlike *nineteen* other medical schools which had rejected Wynne (Pet. App. 153-158), gave Wynne a chance to prove himself.

the student evaluations and promotions committee and the student appeals committee voted to dismiss Wynne. Pet. App. 278-279, 189-190.

Then, on its own initiative, Tufts arranged and paid for neuropsychological and intelligence testing for Wynne. Pet. App. 282, 207, 210-222. These seventeen tests and behavioral observations revealed significant cognitive difficulties for Wynne, particularly in linguistic processing and retrieval of information. The tests, however, failed to diagnose *any* specific learning disability, although the tests did suggest the possibility of some type of learning disability.[5] The term "dyslexia" was not used or suggested in the written report of the neuropsychological evaluation. Pet. App. 210-222. Indeed, the term "dyslexia" was *never* used in relation to Wynne before Tufts dismissed him. Pet. App. 295-296. Wynne has stated he was not aware of his dyslexia. Pet. App. 197-198. Wynne was not specifically diagnosed with dyslexia until January 1986, *after* leaving Tufts. Pet. App. 183-184.[6]

Following review of the neuropsychological testing, Dean Banks overruled the evaluation committee's recommendation and permitted Wynne to repeat the first year curriculum (Pet. App. 297; App. 30a), subject to guidelines and procedures calculated to enable him to succeed. App. 30a. Tufts provided a study plan, tutoring, and other suggestions

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[5] The evaluations performed while Wynne was at Tufts suggested that Wynne's "weaknesses are in areas heavily stressed and emphasized in this type of academic setting." Pet. App. 221.

[6] Wynne's complaint that Tufts did not send Wynne to a *physician* for a diagnosis is especially misleading. When Wynne sought a diagnosis, *after* leaving Medical School, he went to a non-physician, Ms. Schupack, a reading specialist in a language disorders unit. Pet. App. 181-187. In any event, Tufts sent Wynne to experts to determine why he was failing and what could be done about it. There is no evidence Tufts did not *want* a diagnosis or wanted to shield its employees from the truth.

for Wynne, including lecture taping and note-takers. *Id.* Wynne was also permitted to take his exams on an untimed basis. Pet. App. 285.

These accommodations enabled Wynne to pass most of his courses in his second attempt to complete the first year curriculum. Unfortunately, however, Wynne again failed both pharmacology and biochemistry. Pet. App. 285.

Although failure of a repeated course was grounds for dismissal, the student evaluations and promotions committee allowed Wynne to retake the pharmacology and biochemistry examinations. Pet. App. 286-287. These exams were untimed. Pet. App. 285. Tufts also provided tutorial assistance for Wynne. Pet. App. 286. These accommodations enabled Wynne to pass pharmacology — a written multiple choice test. Pet. App. 294. In his third attempt, however, Wynne again failed biochemistry, also a written, multiple choice exam. Pet. App. 294. The three other students who took the biochemistry make-up examination passed. Pet. App. 286. All students at Tufts Medical School must pass biochemistry in order to earn a degree. Pet. App. 190-191.

During the 1983-1984 academic year Wynne passed two examinations which consisted exclusively of multiple choice questions: Physiology and Interviewing. App.19a. In 1984-1985, Wynne passed Hematology and Growth and Development, both of which were entirely written multiple choice examinations. App. 19a.

The evaluations committee again recommended dismissal following Wynne's third failure in biochemistry. On September 11, 1985, the student appeals committee met, and Wynne presented a written statement. App. 33a. Wynne's prepared statement set forth his reasons for his academic difficulties, as well as proposed solutions. Wynne blamed his failure of the

biochemistry make-up exam on a "lack of confidence in myself," his poor health and other factors. App. 33a. He referred to an "apparent learning disability." App. 34a. Wynne stated:

> The learning disability recommendations suggested that my primary difficulty may be in recalling numerous unrelated facts; however, I did well in anatomy which requires such recall. *It appears to me that much of the problem lies on the fact that I don't trust my better judgment, and continue to allow trivial facts to influence my decisions, especially on multiple choice exams.* Biochemistry has been of particular concern to me because it entails both numerous discrete facts, as well as subtle choices which challenge my still weak confidence in my own judgment, a product of my weak performance the first year.

(App. 33a - 34a) (emphasis added).

In this statement, on the eve of his dismissal from Tufts, Wynne's reference to his "primary difficulty" in the area of "recalling numerous unrelated facts" plainly did not point to a handicap. Further, Wynne did not request an alternative to multiple choice examinations. Pet. App. 288.[7] Neither did he request an oral examination in biochemistry, or in any other course. Pet. App. 289, App. 33a. Instead, the accommodation which Wynne suggested in his written statement was a one semester leave of absence so that he could "fully concentrate on cultivating a positive attitude, strengthening my academic skills and addressing my weaknesses by seeking professional help." App. 34a.

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[7] Petitioner's Appendix at 289 contains a serious typographical error. Dean Feinblatt's affidavit asserted that "Wynne did *not* say in this statement that he should not have been given written multiple choice examinations." The second "not" was dropped from the petitioner's Appendix.

Tufts' faculty and administrators decided that they had accommodated Wynne to the extent feasible. Dean Banks' and Dean Feinblatt's affidavits set forth their conclusions regarding Wynne's academic problems. Pet. App. 277-291, 292-298, and 188-193. Their professional determination was that to permit Wynne to remain at Tufts and to continue to try to master the first year course of study would have

> required a lessening of the Medical School's standards to an unacceptable degree. A Tufts University School of Medicine diploma signifies to the public that the faculty has determined that the student is fit to practice medicine. Tufts' tests and testing procedures are specifically designed to measure would-be physicians' ability to practice medicine, safely and soundly. To have permitted Wynne to take tests again and again until he passed them would have undermined the credibility of the diploma.

Pet. App. 290-291. The faculty also determined that Wynne was not a suitable candidate for the practice of medicine. Id. Dean Banks agreed with the evaluations and appeals committees. Pet. App. 293. He believed that the Medical School had "accommodated Wynne to the extent that it was academically feasible to do so." Pet. App. 295. Therefore, he dismissed Wynne in 1985. Pet. App. 294.

Wynne's academic profile did *not* suggest he had a disability-related inability to pass written, multiple choice tests. He passed many such tests. He failed biochemistry, three times. Nonetheless, in accordance with the court of appeals' guidelines, Tufts' summary judgment submissions below provided the Medical School's reasons for and history of using multiple choice tests.

Written, multiple choice examinations constitute an essential part of medical education at Tufts and other universities. The biochemistry department at Tufts Medical School has used written multiple choice tests, either predominantly or exclusively, at least since 1973. Pet. App. 248-249. It is the judgment of the Tufts faculty that written multiple choice questions best permit coverage of a large amount of material while providing an objective measure of a student's knowledge of biochemistry. The multiple choice format also mirrors the actual practice of medicine: multiple choice examinations demand the ability to read, assimilate, and make choices based on the comprehension of complex written information — all of which, Tufts professors reasonably believe, are essential abilities for physicians. Pet. App. 256-262, App. 191-192. Biochemistry professors at Tufts engage in a rigorous process of preparing the biochemistry examinations in order to ensure that the questions will test the students' knowledge and ability to apply principles of biochemistry. Pet. App. 256-262.

Furthermore, Tufts' biochemistry examinations are consistent with national testing formats. Pet. App. 258-259. The National Board of Medical Examiners administers a two day examination (NBME Part I) consisting of six books of multiple choice items covering, *inter alia*, biochemistry. Pet. App. 271.[8] At the conclusion of their second year, all students at Tufts Medical School must take the NBME Part I in order to progress to their third year. Pet. App. 258-259, App. 297-298. In deciding to dismiss Wynne, Dean Banks took into consideration that Tufts' tests were in the same format as the NBME Part I which Wynne would necessarily have to pass after his second year, if he made it that far. Pet. App. 297-298. Also, Tufts and many other medical schools subscribe to the Medical Biochemistry Question Bank, a service which pro-

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[8] Forty-eight states accept NBME certification as the basis for initial licensure. App. 37a.

vides exclusively written multiple choice questions for use on medical school biochemistry examinations. Pet. App. 257-258.

Tufts' biochemistry professors believe that oral examinations in biochemistry would be unacceptable. To their memory, the Medical School has never tested medical students orally in biochemistry. Pet. App. 255. The biochemistry professors believe that oral examinations in biochemistry would not be fair, comprehensive, objective, or feasible. Pet. App. 254-257.

As the above description makes plain, this case does not present a clear record upon which this Court may review the statutory rights of disabled students to modified testing procedures in graduate and professional schools. On the contrary, the undisputed record facts demonstrate that

- Wynne never informed Tufts, nor was Tufts otherwise made aware, that Wynne had dyslexia; the diagnosis of dyslexia was not made until 1986, after Wynne had been dismissed by Tufts;

- Tufts in fact accommodated Wynne's difficulties by providing various forms of aid, tutors, and untimed examinations;

- Wynne received passing grades in numerous written, multiple choice exams, ultimately passing all courses, but failing (three times) biochemistry, a required course;

- Tufts' medical educators undisputedly believed that written multiple choice exams represent the fairest and most comprehensive way to test the mass of material required in biochemistry;

- When Wynne had the opportunity after his third biochemistry failure to inform the student appeals committee what he wanted, he did not ask for either an oral examination or the oral rendering of a written examination (a method not mentioned until four years after the litigation began, on remand in the federal district court, App. 42a - 44a); and

- In Wynne's last meeting with the student appeals committee, he requested only a leave of absence from Tufts, so that he could improve his study skills, focus on biochemistry, and return to the Medical School with an improved attitude (App. 34a).

C. The Contentions of the Parties and the En Banc Opinion Below

In its *en banc* opinion, the court of appeals attempted to harmonize what it viewed as Wynne's rights under the federal Rehabilitation Act of 1973 and Tufts' right to be free from unwarranted judicial interference in the making of academic decisions about the fitness of would-be physicians. Wynne claimed an absolute right to have Tufts alter its examination procedures, in order to accommodate his handicap. Tufts' position was that Wynne was not "otherwise qualified," that he had failed the required curriculum, that Wynne had never made known to Tufts, nor was Tufts otherwise aware, that Wynne even had dyslexia, and that the accommodations which Tufts in fact did provide were both reasonable under the circumstances and, beyond that, were effective in enabling Wynne to pass all but one of the Medical School's courses. Tufts has continually invoked its academic freedom rights to make academic decisions about who should continue on in Medical School. *E.g., Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concur-

ring) (identifying the "four essential freedoms" of a university - i.e., the freedom to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study").

As a separate and independent basis for decision, which the district court and court of appeals did not address, Tufts argued that the governing federal regulations, 45 C.F.R. § 84.44, do not require academic institutions to modify course examinations except in the instance of a student whose disability is either "sensory, manual or speaking," and that dyslexia, even if Tufts had known Wynne had the condition, is not such a condition as to require accommodation to Tufts' testing procedures.

The court of appeals' *en banc* opinion asserted:

> "If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a 'purely legal one'. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985). Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.

932 F.2d at 26.

The court of appeals also stated that Tufts would have to establish that it had arrived at a "reasoned, professional academic judgment." 932 F.2d at 27.

Although Wynne argues that the court of appeals subverted normal judicial processes in arriving at this formulation, this is not the case. Rather, the court of appeals made clear that it was applying customary summary judgment standards. What the court of appeals did was to define the *legal* standard, in light of existing Supreme Court precedents, which it believed the federal district court must apply in reviewing the unusual claim of a disabled student concerning a concededly academic decision by university administrators and deans.

On remand, pursuant to the *en banc* opinion, Tufts provided answers to factual questions which the court of appeals had raised in its opinion. 932 F.2d at 26-27. Tufts' affidavits described the history and purposes of Tufts' use of written multiple choice testing, particularly in biochemistry, provided further details about the meticulous formulation of the tests, including their consistency with required national testing formats, and gave the entire history of Wynne's academic performance at Tufts. The district court found that Tufts' submissions satisfied the court of appeals' standards. Pet. App. 116-121. The court of appeals affirmed. Pet. App. 1.

The court of appeals' third and final opinion focused on the particular facts of this case, describing the facts as "idiosyncratic." 976 F.2d at 796. The court also found that the record presented no genuine issue as to any material fact. In so doing, the court of appeals emphasized four points about the record before it. First, the affidavits established Tufts' reasons for giving written, multiple choice examinations. Second, the facts established that Tufts provided numerous accommodations, notwithstanding that Tufts did not know that Wynne had dyslexia. Third, relying on *Nathanson v. Medical College*

of Pennsylvania, 926 F.2d 1368, 1381 (3rd Cir. 1991), the court of appeals pointed out, among other things, that Wynne never requested, at any time before taking and failing the third biochemistry exam, that an oral examination be substituted for written multiple choice tests. Fourth, the court of appeals found Wynne had not set forth any facts which tended to undermine Tufts' assessment of the efficacy of written multiple choice examinations. 976 F. 2d at 795-96.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION WARRANTING REVIEW.

In determining whether to accept review, the Supreme Court typically seeks to determine whether the case presents an important federal question. This case does not present an important federal question, either as to summary judgment standards, or as to the governing legal standards under the Rehabilitation Act.

Wynne's allegations do not merit the attention of this Court, which "does not sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (holding writ of certiorari improvidently granted). The requirement of "special and important reasons" embodied in Supreme Court Rule 17 "impl[ies] a reach to a problem beyond the academic and episodic." *Id.* at 74. Given this Court's "capacity to decide only a small fraction of cases on the merits," this Court "must grant certiorari only in those cases that will enable [it] to resolve particularly important questions." *Yee v. City of Escondido, Cal.*, ___ U.S. ___, ___, 112 S. Ct. 1522, 1533 (1992). This case does not reach that level.

Wynne cleverly seeks to paint this as a case of great general importance concerning dyslexia, its victims, and their true abilities. This is not such a case. Wynne uses the word dyslexia or dyslexic no fewer than 26 times in his petition, as if, by repetition of terms evoking both sympathy and memories of famous persons similarly afflicted, he could alchemize his case into one warranting review.[9] This Court should keep several critical facts in mind in reviewing Wynne's petition.

First, the word dyslexia was *never* used while Wynne was a student at Tufts. Wynne did not know he had dsylexia, Tufts did not know he had dyslexia, and *seventeen* neuropsychological tests did not reveal dyslexia. Wynne complained about a host of factors that interfered with his academics — his move from California, weak confidence in his abilities, having to write a Master's thesis (a self-imposed obligation), health issues, and adoption of a "persona" that did not help him. App. 26a. But he *never* asserted he had a specific learning disability which caused him to fail written multiple choice exams. Such a claim, in any event, would have been untenable.

Second, Wynne received passing grades in many exams, including exams that were exclusively written, multiple choice in format. App. 19a. He failed biochemistry, however, three times. Thus, the record may not be characterized, as Wynne would have it, as one in which a student, known to be dyslexic, has a disability-induced inability to pass written, multiple choice exams, and timely requests a specific alternative.[10]

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[9] The word "dyslexic" is the *third* word in Wynne's first question presented. Petition, at i.

[10] Wynne's description of his vague comments to Dean Griffin about "problems" he was having on multiple choice examinations (Pet. at 11) is a scenario that undoubtedly occurs every day across the country in academic institutions. This may not reasonably be characterized as notification of a disability.

Third, Wynne made no specific request, before his *third* biochemistry failure, for an alternative type of examination. Beyond that fact, although Wynne's initial litigation position was that Tufts must provide him an oral examination, an accommodation which he incorrectly asserted was routinely provided by the National Board of Medical Examiners, Pet. App. 275, Wynne's counsel has switched course during the litigation. He informed the district court, at oral argument on remand, that Wynne wanted an oral *rendering* of the same multiple choice exam given to other students, a method which, while consistent with NBME procedures, was never previously requested. (App. 42a - 44a).

The Supreme Court should plainly avoid issuing any broad new pronouncements on the rights of learning disabled medical school students on this record.

The record also makes clear that the court of appeals did not believe it was charting new ground, other than to apply what it regarded as accepted legal standards to an unusual fact situation, with the parties contending for adoption of their "expansive" claims, 932 F.2d at 22.

As to summary judgment standards, the court of appeals applied commonly accepted law. The court cited this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986), and other First Circuit opinions applying settled summary judgment principles. Applying these standards, the court of appeals affirmed, finding that "the record presents no genuine issue as to any material fact." 976 F.2d at 794.

As to the underlying substantive law, the court of appeals, in its *en banc* opinion, had carefully reviewed this Court's opinions in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), *Alexander v. Choate*, 469 U.S. 287 (1985), *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273

(1987), *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), and numerous other circuit court opinions, in fashioning legal standards for adjudicating handicap discrimination claims in the context of an academic decision.

Wynne's complaints about discrimination are without merit. There is no evidence that Tufts ever discriminated against dyslexics. For all that appears, persons with dyslexia (unknown to Tufts) have passed multiple choice examinations and graduated. The notion that Tufts devised tests that have a disproportionate adverse impact on dyslexics is not supported in the record.

The court of appeals' *en banc* opinion, to the extent that it may be in error, actually favors Wynne, by not requiring plaintiffs to demonstrate evidence of discriminatory animus or stereotyping of disabilities. In that sense, the court of appeals' standards impose more burdens on academic institutions than is proper. Tufts urged the court of appeals to follow such cases as *Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988), in which the Seventh Circuit seemed to require the student-plaintiff to demonstrate that the institution harbored a discriminatory animus or engaged in stereotyping of disabled students. At any rate, the First Circuit did not believe its opinion was in conflict with other circuit courts' opinions.

Although this Court has granted certiorari to resolve circuit conflicts in many contexts, in those situations, there is a real or "intolerable" conflict on an identical legal or factual issue, not merely an inconsistency in dicta or in the general principles applied. Thus, when this Court has granted certiorari, the circuit courts themselves have explicitly recognized their opinions as being in conflict with those in other circuits. *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (certiorari granted to review Third Circuit opinion that recognized that its interpretation of a statute was "squarely inconsistent" with

that of the Sixth Circuit); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982) (certiorari granted to review a Third Circuit decision on a matter under the federal discovery rules where the Third Circuit acknowledged that the Fifth Circuit's position on the identical issue "appears to be to the contrary, but we find ourselves in disagreement with that case," 651 F.2d 877, 885 (3d Cir. 1981)).

In short, this Court ought not to step in to resolve conflicts until such time as the circuits themselves believe they are in conflict.[11] *See McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of certiorari addressed to "those of my Colleagues who agree with me [on the merits of the issue] but believe that this Court should postpone consideration of the issue until more . . . federal circuits have experimented with substantive and procedural solutions to the problem"). Such conflicts may indeed arise, due to the recent enactment of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(a), *et seq.* The Supreme Court, however, should let ADA law develop before stepping in to resolve issues.

Furthermore, the case here, involving a claim by a student to modified testing procedures in a graduate medical school, is unique. Other academic cases have dealt with such situations as

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[11] Indeed, by confining its review of cases to such real and recognized conflicts, this Court shields itself from having to dismiss a writ of certiorari as improvidently granted when subsequent examination reveals that the alleged conflict giving rise to the grant does not in fact exist. *See Sanchez v. Borras*, 283 U.S. 798 (1931); *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co., Inc.*, 264 U.S. 314 (1924).

- the average grade in law school required for further study by an alleged alcoholic student, *Anderson v. Univ. of Wisconsin*, 841 F.2d 737 (7th Cir. 1988);

- the emotional disability of a medical student which raised issues concerning her emotional fitness to attend medical school and practice medicine, *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981);

- the *physical* accommodations required for a medical school student suffering from a back injury, *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1381 (3rd Cir. 1991);

- the admission requirements to a medical school's psychiatric residency program for a person suffering from multiple sclerosis, *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981),

- the physical inability of an optometry student to use instruments to satisfy clinical proficiency requirements, *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir.), *cert. denied*, 493 U.S. 810 (1989); and

- the dismissal from a dental school of a student who tested HIV positive, *Doe v. Washington University*, 780 F. Supp. 628 (E.D. Mo. 1991).

The facts here are not only "idiosyncratic," to use the First Circuit's description, 976 F.2d at 796, they may well not be repeated. Therefore, although the case is undoubtedly important to Wynne — and, as well, to Tufts and its educators who accommodated Wynne and made difficult decisions about him — the case does not warrant review.

II. THIS CASE DOES NOT PRESENT A SUFFICIENTLY CLEAR RECORD UPON WHICH TO BASE CHANGES IN FUNDAMENTAL LEGAL STANDARDS.

Wynne urges this Court to create new law governing the rights of disabled students to modified examinations, thereby avoiding discrimination against learning disabled students.[12] As stated earlier, there is no split in the circuit courts of appeals on the issues presented. Furthermore, as stated earlier, to the extent that the First Circuit's opinion differs at all from other circuit court opinions, the court of appeals' opinion is more favorable — incorrectly so — to the rights of plaintiffs, by not requiring proof of any discriminatory animus or stereotyping by the academic institution.

In any event, the Supreme Court is presented here with a fact-bound record, one in which the district court and the court of appeals found that the undisputed material facts favored Tufts' position. Although Wynne presents himself as the champion of disabled students struggling against monolithic academic indifference to their plight, the factual record does not support his position. *If* Wynne had announced his dyslexia, *if* he had passed all his non-multiple choice exams and had failed all his multiple choice exams, *if* he had timely requested oral examinations or oral renderings of his multiple choice exams, *if* Tufts had not accommodated him at all (or had rejected him at the outset based solely on his dyslexia), then the record might be sufficiently clear for this Court to review the case. Even in that context, Tufts would contend that under 45 C.F.R. § 84.44 Tufts need not alter its course examinations

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[12] Wynne's "question presented" concerning denial of his claimed right to a jury trial (Pet. at ii) is frivolous. The case was not tried *at all*, and thus no issue arises as to whether petitioner's claim is jury triable. The court of appeals did not address the issue.

for Wynne, because Wynne's dyslexia is not a "sensory, manual, or speaking" disability. But the case does not present that type of record. Therefore, the Supreme Court should decline to grant the writ.[13]

III. THE DEPARTMENT OF EDUCATION'S REGULATIONS, WHICH THE COURT OF APPEALS DID NOT CONSIDER, PROVIDE INDEPENDENT SUPPORT FOR THE DECISION BELOW.

From the outset of this litigation Tufts has urged the district court and court of appeals to hold that under 45 C.F.R. § 84.44, academic institutions need not alter their course examinations at the behest of disabled students, unless the disability involves a "sensory, manual, or speaking" skill, "except where such skills are the factors that the test purports to measure." The regulations distinguish between physical accommodations which may generally be required in an academic setting, and accommodations to *course examinations*. While academic institutions in certain circumstances may be required to change their curricula in order to accommodate the needs of disabled students, they need not change their examination procedures, except with respect to disabilities which by their very nature involve "speaking, sensory, or manual" disabilities.

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[13] Wynne's "question presented" regarding discovery also does not merit review. Both lower courts properly ignored his request for discovery. Wynne did not properly follow Fed. R. Civ. P. 56(f) by filing an affidavit detailing what discovery he wanted. Also, Wynne had every opportunity to present affidavits from other schools (he filed an affidavit from Dr. Smith of Brown University's *Program* — not school — in Medicine) or from any educational experts he might find. Further, nothing that Wynne proposed to "discover" in his request for discovery would have created triable issues. This issue plainly does not warrant review.

Wynne's disability is not "sensory." Nonetheless, even if dyslexia *is* sensory, Wynne's difficulties with reading, assimilation, and recall of facts are among the factors that the "test[s] [purport] to measure." Therefore, under the governing federal regulations, Tufts need not have accommodated Wynne's dyslexia, even if Wynne *had* informed Tufts and asked for an oral rendering of the exam or an oral exam.

The federal district court and court of appeals failed to treat this issue. The availability to Tufts of this alternative basis for decision, favorable to Tufts, is still another reason for this Court not to review the court of appeals' decision.

CONCLUSION

For the foregoing reasons, respondent Tufts University School of Medicine respectfully submits that this Court should deny Wynne's petition for a writ of certiorari.

Respectfully submitted,

TUFTS UNIVERSITY SCHOOL
OF MEDICINE

By its attorney,

Alan D. Rose
Counsel of Record
James N. Boudreau
Nutter, McClennen & Fish
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Boston, MA 02110-2699
(617) 439-2261

March 22, 1993

RESPONDENT'S APPENDIX

RESPONDENT'S APPENDIX

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT CIVIL ACTION NO. 88-0576
STEVEN WYNNE, *Plaintiff* VS. TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant*	*COMPLAINT AND DEMAND FOR JURY TRIAL*

INTRODUCTION

1. This is an action in two counts alleging violation of plaintiff's civil rights under Mass.Gen.Laws ch. 12, ss. 11H, III and in violation of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. s. 794 ("Section 504") for damages suffered by plaintiff as a result of his dismissal from the defendant's medical school program.

PARTIES

2. The plaintiff, Steven Wynne, resides in Boston, Suffolk County, Massachusetts, and so resided at the times relevant hereto.

3. The defendant, Tufts University School of Medicine, is a corporation doing business and having a principal place of business at 136 Harrison Avenue, Boston, Suffolk County, Massachusetts.

STATEMENT OF FACTS

4. Plaintiff suffers from a learning disability and is a handicapped individual otherwise qualified to attend medical school.

5. In August 1983, plaintiff matriculated in defendant's medical school program, having been accepted to do so on the basis of the academic standards and other representations set forth in defendant's official publications.

6. Between August, 1983 and August, 1985, plaintiff was enrolled in defendant's medical school program.

7. On or about August 30, 1984, plaintiff first requested that defendant make reasonable accommodation for his handicap. Thereafter, plaintiff repeatedly made known his handicap and need for effective auxiliary aids.

8. Defendant failed reasonably to accommodate plaintiff by adequately modifying its means of educating and testing plaintiff consistently with his learning disability, such that plaintiff was prevented from learning and demonstrating his ability to master the knowledge areas and skills necessary to apply for and receive a license to practice medicine.

9. Defendant could have modified its education and testing of plaintiff in such a way as to cause no disruption to its academic program and without dilution or diminution of its academic standards.

10. As a result of defendant's refusal to reasonably modify its program, plaintiff was prevented from meeting the school's academic requirements, which had been unilaterally changed by defendant after plaintiff's enrollment on the program.

11. On or about September 29, 1985, defendant sent plaintiff a notice of dismissal from defendant's medical school program based on his alleged inability to maintain defendant's academic standards.

12. Defendant continues to refuse to enroll plaintiff as a student in the medical school program, to reasonably modify its program sufficiently to accommodate plaintiff, or otherwise permit plaintiff to complete his medical education.

13. Because of defendant's actions as described in the previous paragraph, plaintiff is prevented from being admitted into any other medical school program; is prevented from applying for or obtaining a license to practice medicine; has been deprived his chosen career for which he is otherwise qualified; has been caused humiliation, anxiety, distress and other mental and physical suffering.

14. But for defendant's refusal to accommodate his handicap, plaintiff is fully able to succeed academically in defendant's program or in some other equivalent medical education program and would be fully capable and qualified, upon completion of such training, to apply for and obtain his license to practice medicine.

15. As a direct consequence of defendant's actions, as described above, plaintiff has been denied statutory and constitutional rights, has been denied the opportunity to complete his medical education, has suffered economic damages and other losses.

COUNT I
VIOLATION OF CIVIL RIGHTS

16. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations contained in paragraph 2 through 15, above.

17. Defendant's acts of failing to provide the plaintiff with necessary and effective aids, failing to modify its academic program reasonably to accommodate plaintiff's learning disability, and in dismissing plaintiff from its program constitutes an interference by intimidation and coercion with plaintiff's rights under Article 114 of the Constitution of the Commonwealth and Section 504 and violates Mass.Gen.Laws ch. 12, ss. 11H, 11I.

WHEREFORE, plaintiff demands that this Court:

a. Enjoin defendant from so interfering with plaintiff's rights secured under the Constitution and laws of the Commonwealth;

b. Order that defendant restore plaintiff to his former position as a student enrolled at the Tufts University School of Medicine;

c. Order that defendant pay to the plaintiff compensatory monetary damages in the amount of $500,000.00;

d. Award the cost of this litigation to plaintiff and against defendant;

e. Award to plaintiff reasonable attorney's fees; and

f. Provide such further relief as in its judgment is fair and equitable.

COUNT II
VIOLATION OF SECTION 504

18. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations contained in paragraph 2 through 15, above.

19. Section 504 establishes for the plaintiff, as a qualified handicapped individual, a right to be free from discrimination based upon his handicap.

20. Defendant is a recipient of federal financial assistance from the United States Department of Education and is therefore, subject to the requirements set forth in Section 504 and its accompanying regulations.

21. The actions of the defendant in failing to provide plaintiff with necessary and effective aids, failing to modify its academic requirements reasonably to accommodate plaintiff, and finally dismissing him from its program constitute a violation of plaintiff's rights guaranteed under Section 504.

WHEREFORE, plaintiff demands that this Court:

a. Enjoin defendant from so interfering with plaintiff's rights secured under Section 504;

b. Order that defendant restore plaintiff to his former position as a student enrolled at the Tufts University School of Medicine;

c. Order that defendant pay to plaintiff compensatory damages in the amount of $500,000.00;

d. Award the cost of this litigation to plaintiff and against defendant;

e. Award to plaintiff reasonable attorney's fees; and

f. Provide such further relief in its judgment is fair and equitable.

PLAINTIFF DEMANDS A JURY TRIAL ON BOTH COUNTS.

Respectfully submitted,

STEVEN WYNNE,
By his attorney,

Dated: January 26, 1988

/Signed/
Robert L. Hernandez
6 Pleasant Street
Malden, MA 02148
(617) 321-8300

UNITED STATES DEPARTMENT OF EDUCATION
REGION I
JOHN W. MCCORMACK POST OFFICE
AND COURTHOUSE, ROOM 222
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

OFFICE FOR CIVIL RIGHTS

January 12, 1987

Dr. Jean Mayer
President
Tufts University
Medford, Massachusetts 02155

Re: Complaint #01-86-2083

Dear Dr. Mayer:

The Office for Civil Rights (OCR) has completed its investigation of the above referenced complaint against Tufts University's School of Medicine (TUSM) under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (Section 504). The complainant alleged that TUSM discriminated against him, on the basis of handicap, when it failed to provide him with academic adjustments and other assistance necessary to accommodate his handicap, resulting in his dismissal from TUSM.

OCR is responsible for enforcing Section 504 and the U.S. Department of Education's implementing regulations found at 34 C.F.R. Part 104, which prohibit discrimination in programs and activities receiving Federal financial assistance from the U.S. Department of Education. TUSM is a recipient of Federal financial assistance and, therefore, subject to the requirements of these regulations.

As a result of our investigation, OCR found that TUSM did not discriminate against the complainant on the basis of handicap. However, during the course of the investigation, OCR found a technical violation in TUSM's "Notice of Nondiscrimination" which you have agreed to voluntarily correct. Our findings are summarized below.

In regard to the allegation that TUSM discriminated against the complainant, on the basis of handicap, by denying him academic adjustments and other assistance necessary to accommodate his handicap, OCR reviewed materials submitted by the complainant and TUSM and interviewed witnesses to determine (1) whether the complainant was a qualified handicapped person; and, (2) whether academic adjustments and auxiliary aids were requested, required, provided and effective.

The regulations at 34 C.F.R. §104.3(j) define a handicapped person as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. OCR found that the complainant is handicapped because he has a specific learning disability.

The regulations (34 C.F.R. §104.3(k)(3)) define a qualified handicapped person, with respect to postsecondary services, as a handicapped person who meets the academic and technical standards for admission or participation in the recipient's educational program or activity. OCR found that the complainant met TUSM's academic and technical standards for admission. However, OCR determined that the complainant failed to meet the academic requirements for continued participation in TUSM's educational program, and that this failure was not a result of TUSM's failure to provide needed and effective auxiliary aids or academic adjustments. For this reason, OCR found that the complainant was not a qualified handicapped person.

TUSM requires that students who fail five (5) or more courses during the first year be dismissed from school. The complainant failed eight (8) courses during the 1983-84 school year and, therefore, was dismissed by the Student Evaluations and Promotions Committee (SEPC). At this point, the complainant had not been identified as a handicapped person. Because TUSM suspected that the complainant had undiagnosed learning disabilities which may have contributed to his academic failures, the Assistant Dean of Student Affairs, TUSM, suggested that he undergo neuropsychological testing to identify any potential learning problems. These tests concluded that the complainant's "type of neuropsychologic profile has been identified in the learning disabled population."

On August 24, 1984, the Dean of the School of Medicine gave the complainant the opportunity to retake all eight (8) courses he failed and to audit the three (3) courses in which he received a "low pass" mark in his first year, 1983-84. The complainant did so and this time, i.e. 1984-85 school year, he passed six (6) courses and failed two (2). According to the Promotions Guidelines, any one failure on a repeated course is grounds for dismissal. The SEPC considered the complainant's case in June, 1985, and voted to allow him to receive additional tutoring in the two courses he failed and take makeup examinations in August, 1985. The complainant retook the examinations in August and again failed Biochemistry. Based upon this third failure in Biochemistry, the SEPC voted to dismiss the complainant in August, 1985. This was upheld by the Student Appeals Committee. On September 29, 1985, the Dean of the Medical College dismissed the complainant.

The 504 regulations (34 C.F.R. §104.44(a)) require colleges and universities to make such modifications to their academic requirements as are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating,

on the basis of handicap, against qualified handicapped students. Modifications may include changes in the length of time permitted for the completion of degree requirements and adaptation of the manner in which specific courses are conducted.

In addition, 34 C.F.R. §104.44(d)(1) and (2) provide that colleges and universities shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under an educational program or activity because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. These aids may include taped texts, interpreters, readers, etc. Recipients need not provide services of a personal nature.

The complainant alleged that he failed two courses because of the lack of academic adjustments and auxiliary aids. Investigation by OCR revealed that the TUSM, Dean of Students, on the recommendation of the psychologist who conducted the neuropsychological testing of the complainant in July, 1984, strongly recommended to the complainant in August, 1984, that in retaking the courses which he failed in his first year that he take advantage of such special aids as taping lectures, using a notetaker, having course tutorials and an adult tutor for study strategies. The complainant used some of these aids but allegedly experienced problems with them. However, with the exception of notifying TUSM of his problems with his tutor, the complainant failed to notify TUSM of problems experienced in the use of other special aids. The complainant and you disagree as to the extent these services were provided and on their effectiveness. Both of you agree, however, that these services were offered and provided on the initiative of the TUSM and were not requested by the complainant.

The complainant states that when he was readmitted to TUSM in August, 1985, he requested a further reduction in his course load and an oral exam. OCR found no evidence to support the complainant's allegation that he asked for a reduced course load. The complainant's request for an oral exam in September, 1985, was untimely as it was made over one month after the complainant failed the Biochemistry exam for the third time.

OCR found insufficient evidence to support the complainant's claim that he was denied academic adjustments and auxiliary aids as required by 34 C.F.R. §104.44(a) and (d). Further, OCR found that it was TUSM which took the initiative in providing, as recommended by the psychologist who tested the complainant in July, 1984, auxiliary aids to the complainant, even though the complainant had not provided notice to TUSM of his need for aids. The complainant was dissatisfied with several of these aids, but OCR could not find sufficient evidence to show that the complainant had informed the recipient of his problems or requested an alternate aid. OCR was unable to conclude, based on the evidence presented, that the auxiliary aids provided by TUSM were ineffective.

Based upon the facts and analysis stated above, OCR concluded that TUSM did not discriminate against the complainant by denying him academic adjustments and auxiliary aids. As such, OCR concludes that TUSM is in compliance with 34 C.F.R. §104.44(a) and (d).

The complainant also alleged that TUSM discriminated against him on the basis of handicap when it dismissed him in September, 1985. The regulations (34 C.F.R. §104.43(a)) provide that no qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, or other postsecondary educational pro-

gram or activity to which this subpart applies. In addition, 34 C.F.R. §104.43(d) provides that a recipient, on the basis of handicap, may not exclude any qualified handicapped student from any course or other part of its educational program or activity.

OCR reviewed the records of other TUSM students who had been reviewed by the SEPC and Student Appeals Committee during the past three years, to determine whether the complainant was treated differently from other students on the basis of handicap. OCR found no evidence of different treatment other than the specific steps taken to provide appropriate aids and adjustments, and no evidence that would change its conclusion that the complainant was not a qualified handicapped person.

OCR found other students (non-handicapped) were required to repeat the first year because of 4 or more failures and to audit any low passes from their first year. OCR also found several examples of other handicapped students who were provided with academic adjustments and auxiliary aids and were successful in a repeat of the first year program.

OCR found that the complainant was not a qualified handicapped person because: (1) He did not request auxiliary aids; (2) TUSM provided aids to the complainant; and, (3) that even with these aids, the complainant was unable to successfully complete all first year courses.

OCR found that TUSM is in compliance with 34 C.F.R. §§104.43(a) and (c). It has concluded that there is insufficient evidence to support the complainant's allegation that TUSM discriminated against him, on the basis of handicap, when it dismissed him in September, 1985.

During the course of this investigation, OCR reviewed TUSM's publications for appropriate notice of non-discrimination and found that TUSM failed to provide the names, addresses, and telephone numbers of its Section 504 and Title IX coordinators. These omissions constitute violations of Section 504 and Title IX, (34 C.F.R §§104.8(a) and (b) and 106.9(a)(1) and (b) respectively.)

On January 9, 1987, TUSM agreed to correct these deficiencies. OCR finds that TUSM is presently fulfilling its obligations under 34 C.F.R.§§104.8(a) and (b) and 106.9(a)(1) and (b). A copy of the Compliance Agreement is enclosed. The agreement indicates that TUSM will provide on February 15, 1987, for OCR's advance review and approval, the text of its revised notice of its obligations under Section 504 and Title IX. Subsequent to OCR's approval of the nondiscrimination notice, TUSM will provide to OCR by March 1, 1987, copies of brochures, inserts and application forms which include the notice, confirming its implementation of the agreement.

The findings and conclusions made as a result of this investigation relate to specific issues that were investigated in this case and do not cover any other civil rights issues not specifically discussed herein. This complaint is closed effective the date of this letter. However, continued compliance is contingent on implementation of the provisions of the Compliance Agreement. Failure to implement its terms may result in a finding of a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will protect, to the extent provided by law, other personal information which, if released, would constitute an unwarranted invasion of privacy.

We wish to thank you and your staff for the cooperation extended to OCR investigators throughout the course of the complaint.

If you have any questions regarding OCR's findings or investigation, please feel free to telephone me at (617) 233-9662.

Sincerely,

Dr. Thomas J. Burns
Regional Civil Rights Director
Office for Civil Rights
Department of Education

cc: William T. Sherry, Jr.
Nutter, McClennen & Fish
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

Encl: Compliance Agreement

I certify this to be a true and accurate copy of the letter issued to Tufts University by the Office for Civil Rights on January 12, 1987.

(signature illegible)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOLOF MEDICINE, *Defendants.*	)	

SUPPLEMENTAL AFFIDAVIT OF
NORMAN I. KRINSKY, Ph.D

I, Norman I. Krinsky, Ph.D, make the following Supplemental Affidavit under oath. I make this Affidavit on the basis of my own personal knowledge.

1. I am a Professor at Tufts University School of Medicine.

2. I was Course Director of Steven Wynne's biochemistry course in the academic year 1984-85.

3. I have read the Affidavit of B. David Stollar, M.D. in this matter. I fully concur in the statement of facts, conclusions, and opinions expressed in Dr. Stollar's Affidavit.

4. In addition to the matters stated in Dr. Stollar's Affidavit, and in the previous Affidavit which I signed in this matter on December 8, 1988, I would add that at Tufts University School of Medicine we have routinely honored requests for untimed examinations. I recall

that in the 1984-85 academic year, Mr. Wynne did request that one of his biochemistry exams be untimed. That is to say, Mr. Wynne was permitted to take as much time as he needed in order to complete the exam. We accommodated that request.

Signed under the penalties of perjury on this 29th day of July, 1991.

/Signed/_____
Norman I. Krinsky, Ph.D
Professor
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendants.*	)	

SECOND SUPPLEMENTAL AFFIDAVIT OF BARBARA CHASE, M.D.

I, Barbara Chase, M.D., do hereby on oath depose and state as follows:

1. I have personal knowledge of the facts stated in this Second Supplemental Affidavit. This affidavit should be read in conjunction with the Affidavit and Supplemental Affidavit which I filed in this matter in 1988.

2. Attached to this affidavit as Exhibit A are documents from the student file of Steven Wynne, which were made and kept in the ordinary course of business by employees of the Tufts University School of Medicine, or were generated by Mr. Wynne where so indicated.

3. I have reviewed the Affidavit of Joel D. Feinblatt, Ph.D. I concur in the statements in his Affidavit, including his description of the events concerning Steven Wynne and of the process which Tufts university School of

Medicine faculty and administrators went through in reviewing Mr. Wynne's academic difficulties, advising and counselling him, accommodating him, making recommendations and finally concluding that he should be dismissed.

4. I would like to emphasize the fact that in my capacity as Dean for Student Affairs, I had considerable contact and conversations with Mr. Wynne during his two years at the School of Medicine. He never requested an oral examination in biochemistry or any other course.

5. In response to a suggestion advanced in the neuropsychological and intelligence tests which we arranged for Mr. Wynne in the summer of 1984, we arranged for his examinations in 1984-1985 to be untimed.

Signed under the penalties of perjury this 31st of July, 1991.

/Signed/
Dean Barbara Chase, M.D.
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendants.*	)	(BBO #427280)

AFFIDAVIT OF CRISTINA S. LEWIS

I, Cristina S. Lewis, do hereby depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit. In preparing this affidavit, I have reviewed course examination files, and records reflecting student grades, all of which documents were made and kept in the ordinary course of business by employees of Tufts University School of Medicine.

2. I have been employed at the Tufts University School of Medicine continuously since 1978. Initially I worked on course evaluations and questionnaires. From approximately 1981 until approximately 1990 I provided the examinations corrections service provided at the School of Medicine. I am currently Systems coordinator at the Medical School.

3. As a result of a request from Dean Barbara Chase, I have reviewed examination files of first year medical school courses given in 1983-1984 and 1984-1985, and I have also reviewed scores received by Steven Wynne. Where possible, I have also reviewed the examinations

themselves to determine which examinations were completely multiple choice in their format and which examinations contained a mixture of written multiple choice questions and essay questions.

4. In the academic year 1983-1984, Mr. Wynne took and passed the following course examinations, all of the questions on which were written multiple choice: Physiology; and Interviewing.

5. In the academic year 1984-1985, Mr. Wynne took and passed the following course examinations, all of the questions on which were written multiple choice: Growth and Development; and Hematology.

6. There were a number of instances in which Mr. Wynne took examinations which consisted of a mixture of written multiple choice and short answer essay questions. For example, in Microbiology I (1983-1984), Mr. Wynne received a score of 63% on the multiple choice portion of the exam and 66% on the essay portion of the exam. Mr. Wynne's cumulative score was 63%, which was the lowest possible passing score. Also, in Microbiology II (1983-1984), Mr. Wynne received a score of 48% on the multiple choice portion of the exam and a score of 50% on the essay portion of the exam. He passed the exam. Further, in Immunology I (1984-1985) Mr. Wynne scored 70% on the multiple choice part of the exam and 78% on the essay portion of the exam. Mr. Wynne passed this course.

Signed under the penalties of perjury this 31st day of July, 1991.

/Signed/_____
Cristina S. Lewis
Systems Coordinator
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

SUPPLEMENTAL AFFIDAVIT OF
DEAN BARBARA CHASE, M.D.

I, Barbara Chase, M.D., make the following Affidavit, under oath, in support of Defendant Tufts University School of Medicine's Reply Brief to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge and on the basis of my review of Tufts' records created, maintained and preserved in the ordinary course of Tufts' business, by persons charged with that responsibility.

1. Mr. Wynne's class rank was in the lowest 1% of his class (149 out of 150) in the academic year 1983-84. His class rank was in the lowest 10% after his second attempt at the first-year curriculum, even though he was only taking a reduced course load.

2. Over the previous ten years, an average of one student per year has been academically dismissed or has withdrawn voluntarily for academic reasons. Approximately 98% of the students who enroll at Tufts go on to successfully complete medical school.

3. The mean undergraduate grade point average for the class entering Tufts in the Fall of 1983 was 3.44. The mean undergraduate grade point average for the class entering Tufts in the Fall of 1984 was 3.3. Mr. Wynne's undergraduate grade point average was 2.43.

4. The mean total MCAT score for students entering Tufts was 56.2 in 1983 and 57.9 in 1984. Mr. Wynne's total MCAT scores were 37, 33 and 41.

5. Evander Duck was a student enrolled at the Tufts University School of Medicine during the academic years 1983-84 and 1984-85.

6. Mr. Duck failed seven courses during his first year of medical school. Both Mr. Duck and Mr. Wynne were required to repeat failed courses and to audit low pass courses as a precondition for repeating the first year curriculum. Mr. Duck voluntarily withdrew from the Medical School after he failed two courses while repeating the first year curriculum. Neither Mr. Duck nor Mr. Wynne was required to retake previously passed courses.

7. Mr. Wynne signed a letter dated November 21, 1984 (a true copy of which is appended hereto as Exhibit A) detailing various remedial measures which Tufts expected Mr. Wynne to take advantage of while repeating his first year. Mr. Wynne agreed to sign this letter after speaking with his advisor, Dr. Theoharides.

8. I was present at a meeting with Dean Griffin and Mr. Wynne where we discussed the letter dated November 21, 1984. At that time, Mr. Wynne stated that he understood Tufts' expectations and that he would take a more active role in arranging for and utilizing various tutorial ser-

vices. I neither participated in nor observed any threats or intimidation directed toward Mr. Wynne.

SIGNED UNDER THE PENALTIES OF PERJURY on this /8th/ day of December 1988.

/Signed/_____
Barbara Chase, M.D.
Dean for Students
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

AFFIDAVIT OF NORMAN I. KRINSKY, Ph.D.

I, Norman I. Krinsky, Ph.D., make the following Affidavit under oath, in support of Defendant Tufts University School of Medicine's Reply Brief to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge.

1. I am a professor at Tufts University School of Medicine ("Tufts").

2. I was Course Director of Steven Wynne's Biochemistry course in the academic year 1984-85.

3. Mr. Wynne failed the Biochemistry course in 1983 and again in 1984.

4. On one occasion, Mr. Wynne and I had a discussion in my office after Mr. Wynne had failed a biochemistry examination. At that meeting we discussed Mr. Wynne's performance on the examination and general concepts of biochemistry. In my professional judgment, based

on our discussion, I feel that Mr. Wynne lacked knowledge and comprehension of basic and fundamental concepts of biochemistry.

SIGNED UNDER THE PENALTIES OF PERJURY on this /8th/ day of December, 1988.

/Signed/_____
Norman I. Krinsky, Ph.D.

(FROM FEINBLATT AFFIDAVIT, EX. 3)

WYNNE, Steve

The academic difficulty which I encountered the first trimester was precipitated by several factors. The social climate of Boston and Los Angeles are radically different, and required a great deal of time and energy to adjust. I also had unwisely brought with me the burden of working on my master's thesis during the beginning of the first trimester. The reaccessment of my financial resources were essential to meet the unexpected full tuition cost, as opposed to financial aid. These issues absorbed tremendous amounts of energy to remeliorate, and thus hampered my academic training. I also was employed as a Histology teaching assistant, which encompassed attending all lectures and labs, attending T.A. meetings at lunch time after each lab, giving three 1 1/2 hour structured review sessions for the class before each test and addressing any independent questions a student might bring to me; totaling approximately 12 hours per week.

I felt that once academic difficulty arose, I also had the added task of proving my capabilities. This attitude propagated a persona that was not advantageous to acquiring the remedial help that I needed. In retrospect, these were unwise and detrimental decisions on my part, but at the time they seemed to be the appropriate strategies. I also felt that the difficulties which I encountered with the multiple choice test, as opposed to the essay and practicum type, stemmed from a lack of communication of pertinent facts. I then sought some informal and formal tutoring in Anatomy, Biochemistry and Statistics. The psychological trauma encountered the first trimester was greater than any experienced to date. The second trimester and third trimester were more successful than the first. Tutoring was sought more frequently, and office appointments with course instructors were initiated. Nevertheless, the

devastation of the first trimester caused me to loose confidence in my ability, which created a "snowball" effect throughout the rest of the academic year.

The decision of dismissal I feel, was centered around a lack of knowledge and communication. The recent discovery of a learning disability was tremendously shocking to me. I had always felt that I had tried harder than many to succeed in school, but it was not because I felt that I had to, but rather that I wanted to. This recent knowledge however, can work to my advantage. Now that the problem has been identified, energy and time need not be wasted in a repetitive way. A general consensus among counselors has been reached and personality friction, stemming from different ideas has been eliminated. Appropriate remedial steps, such as recording lectures, more structured tutoring with individuals, which from past experiences of trial and error are effective. Arrangements for a learning disability tutor can be easily elicited.

I would very much like the chance to repeat the year this fall. If I were given this opportunity, several remedial steps would be taken. A change of advisors, with whom there would be extensive contact and a source of communication with the intricate resources within the school would be helpful. I also would have acquired from the past year's experience concepts, which would act synergistically with my learning style. If this is not permissible, another alternative is to audit the first year curriculum on a leave of absence. I could finish my master's thesis, seek professional input regarding my overt behavior, which elicits the misinterpretation of unconcern. Also the curriculum in 1985 as I understand, will be structured around definitive courses, which would permit the best use of my strong attributes. Such educational aids as lecture tapes would be standard learning material to all students at that time. I feel that these actions are the least I can do to be a successful medical student at Tufts.

(FROM FEINBLATT AFFIDAVIT, EX. 4)

TUFTS UNIVERSITY
School of Medicine
August 24, 1984

Office of the Dean

Mr. Steven Wynne
Posner Hall
Tufts University School of Medicine
200 Harrison Avenue
Boston, Massachusetts 02111

Dear Mr. Wynne:

I have reviewed your record and in view of the extent of your academic difficulty this year, I can understand the decisions of the Student Promotions Committee and the Student Appeals Committee. However, I have given a great deal of thought to our conversations and to the report of your testing. Based on this, I would like to give you an opportunity to continue your education here at Tufts University School of Medicine.

I am offering you the choice of two options. You may take a year's leave of absence beginning now in order to complete your master's thesis and to improve on your learning skills. You would then return as a first year medical student in August, 1985. Your other option is to begin again next Monday, August 27, 1984 as a first year student. You will be required to retake and pass all courses which you failed this year, and audit the courses in which you received a grade of low pass.

Whenever you decide to re-enter the first year class, I expect that you will work with Drs. Griffin and Chase to implement the learning strategies that have been recommended for you. I would remind you that in accordance with our promotion guidelines, more than four failures at any time during your year are grounds for dismissal. Given the timing involved, please inform us of your decision as soon as possible.

I wish you success.

Sincerely,

/Signed/
Henry H. Banks, M.D.
Dean

(FROM FEINBLATT AFFIDAVIT, EX. 5)

TUFTS UNIVERSITY
School of Medicine

Office of the Dean

November 21, 1984

Mr. Steven Wynne
Posner Hall, Box 35
136 Harrison Avenue
Boston, Massachusetts 02111

Dear Mr. Wynne:

As was discussed in our meeting of August 30, 1984, between yourself, Dr. Chase and me, there are several requirements and interventions which we wish to offer you to maximize the likelihood of your academic success this year. They are outlined below for the record and are identical to the format which we reviewed and to which you verbally agreed.

You have agreed to:

A. Repeat the following courses:

1. Biochemistry
2. Behavioral Science I
3. Immunology
4. Hematology
5. Anatomy

6. Epidemiology/Biostatistics
7. Molecular Biology
8. Pharmacology

B. Audit the following courses: (You go to class and take all exams; we grade exams: will not become a part of academic record)

1. Physiology
2. Medical Microbiology
3. Medical Microbiology II

C. In addition the following recommendations have been formulated by Drs. Busch and Rey-Casserly to assist you in this academic year:

1. You will arrange for taping lectures.
2. You will arrange for a note taker.
3. You will arrange for tutorials beginning now for all courses failed.
4. You will arrange for frequency of tutorials to be determined by tutor and course director evaluation of need.
5. You will restructure study strategies under the tutelage of an adult learning tutor 1-2 hours per week.
6. You will meet with me or my designate at least every two weeks.

We have arranged for course tutorials and a learning tutor for you and would be happy to arrange any other resources which you wish to use. While we cannot require you commit yourself, to the recommendations set forth in Item C, you are strongly urge to take advantage of them. If you choose not to do so, it is understood that you do so of your own volition.

Sincerely,

/Signed/
Marilyn P. Griffin, M.D.
Assistant Dean for Curriculum &
Student Affairs

I have read and understood the terms of this letter.

/Signed/
Steven Wynne

/date inserted/
Date

(FROM FEINBLATT AFFIDAVIT, EX. 8)

Sept. 6, 1985

FINAL DRAFT:

To the Promotions Committee:

Appealing the decision reached on August 15, 1985

Re: Wynne, Steve

My failure to successfully complete the biochemistry make-up exam, I believe revolves around a lack of confidence in myself which was prevailing throughout the year, because of my previous poor performance. Last August the Dean offered me the option of taking a leave of absence, before starting this past year. I chose to continue my studies right away in order to establish something positive to build on. I feel I have done considerably better than last year; yet the pressures and expectations, especially with respect to biochemistry were more than I could compensate for in the limited amount of time I had with the full course load.

The situation was compounded by several health issues. I had a buccal mass removed at the beginning of the summer. In the middle of the summer the pathology report said it was suggestive of toxoplasmosis. Three weeks before the make-up exam, the infectious disease department confirmed the diagnosis. Also at the beginning of the summer, I was screened positive for glaucoma. After numerous appointments and tests, the diagnosis was confirmed a week and a half before the exam.

The learning disability recommendations suggested that my primary difficulty may be in recalling numerous unrelated

facts; however I did well in anatomy which requires such recall. It appears to me that much of the problem lies on the fact that I don't trust my better judgement, and continue to allow trivial facts to inadvertently influence my decisions, especially on multiple choice exams. Biochemistry has been of particular concern to me because it entails both numerous discrete facts, as well as subtle choices which challenge my still weak confidence in my own judgement, a product of my weak performance the first year. I believe that there has been a lot of improvement in my efficiency, my studying methods and my attitude during the past year. Unfortunately, my apparent learning disability has not been adequately addressed, thus causing me to fail by a very narrow margin.

In view of the above, I would like to request a leave of absence for one semester. During this leave I will fully concentrate on cultivating a positive attitude, strengthening my academic skills and addressing my weaknesses by seeking professional help. I propose a revised battery of remedial steps, that stem from new information acquired this past year, using the discipline of biochemistry as a protocol of the ultimate problem:

(a.) I will seek therapy to sort out any psychological basis of the problem, regain my confidence, lower the anxiety level and lack of patience with myself. I have already communicated at some length with Dr. Van Pruitt, who would make the necessary arrangements for consultation.

(b.) I will seek professional help in Biochemistry for specific guidance in acquiring the appropriate information and developing confidence in what I know, so that I may apply it successfully in decision making. I have spoken to Dr. Orme-Johnson, who is willing to work with me on the above. Within this interaction I will focus my efforts not just on acquiring numerous specific facts as the original learning disability testing suggested, but also on abstract reasoning, which had been overlooked previously.

(c.) I will also seek more intense tutoring with a reading disability specialist on non-science material to strengthen my data acquisition technique.

If permitted, I could participate in the new curriculum, using biochemistry as a data-base to enact the fore-mentioned revised remedial steps. The structure of the new curriculum has more personal interactions, with more student and small group teaching sessions, which therefore would be highly advantageous for me. I could take a competency exam at some point in the year. Finally, a leave of absence will allow me to complete the writing of my still pending master's thesis, which must be presented this year, and of which I have only written part of the first draft. A short publication will probably ensue.

My progress could be followed from devastating problems the first year, to an almost successful second year, unto my exposure to the new curriculum with more time to reflect and address my disability without the constant pressure of a full course load. This venture would also afford the administration a working model, of which to monitor academic problems from the beginning, the application of initial remedial steps leading to almost success and finally the application of a refined plan, which I feel confident will alleviate the problem.

I feel that the best time to take this leave of absence is now, rather than last August (after the first year), when I still had a negative attitude and was not yet comfortable with the situation or myself. I appreciate your continued understanding, patience and help. I am determined to be successful at Tufts medical school and become a competent physician. I am asking that I be given the chance to continue with this growth process, which I know will allow me to cultivate a positive attitude as well as my strengths.

NATIONAL BOARD OF MEDICAL EXAMINERS DESCRIPTIVE MATERIAL

(EXCERPTED FROM SCHULTE DEC. 1988 AFFIDAVIT, EX. A. P. 5)

* * *

This bulletin contains procedural and policy information with which all examinees taking the Part I, Part II, and Part III examinations administered by the NBME should be familiar. Policies, procedures, requirements, and other information shown in this edition pertain to and will be in force during the calendar year 1989. Updated information appears throughout this 1989 edition. In this regard, particular attention is called to the section describing the Part III examination.

In subsequent years, additional changes may occur and examinees are advised to consult the most recent edition of this publication to ensure an accurate understanding of current National Board examination and certification policies, procedures, and other information pertinent to NBME certifying examinations and certification.

NATIONAL BOARD EXAMINATIONS

The NBME is a nonprofit, independent organization. The Part I, Part II, and Part III certifying examination administered by the National Board are one of two paths to licensure. The National Board prepares and administers its examinations and established requirements for certification of its Diplomates. The individual states set their own rules and regulations for granting licenses to practice medicine within their jurisdictions.

National Board certifying examinations are taken by more than three-quarters of the students in accredited schools of medicine in the United States. Based upon current information provided by the states, National Board certification is accepted as qualification for initial licensure by the medical licensing authorities of all states and territories except Louisiana, Texas, and the Virgin Islands. Additionally, the certificate of the National Board is accepted for initial licensure in the Canadian provinces of Alberta and Ontario. Some jurisdictions may have additional regulations concerning endorsement of National Board certification, and, therefore, those seeking endorsement in a particular jurisdiction are advised to obtain complete information from the licensing board.

National Board certification provides a permanent record of qualification for licensure as outlined above and the NBME, at the request of a Diplomate, will certify examination scores to the various medical licensing authorities.

* * *

ADDENDUM

45 Code of Federal Regulations

Subpart E — Postsecondary Education

§84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipi-

ent can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaption of the manner in which specific courses are conducted.

(b) *Other Rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in the classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course Examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which the subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary Aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxilliary aids for students with impaired sensory, manual, or speaking skills.

2. Auxilliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of personal nature.

APPENDIX A TO PART 84 - ANALYSIS OF FINAL REGULATION

SUBPART E-POSTSECONDARY EDUCATION, Subpart E prescribes requirements for nondiscrimination in recruitment, admission and treatment of students in postsecondary education programs and activities, including vocational education.

31. *Academic Adjustments.* Paragraph (a) of §84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed. Paragraph (b) provides that postsecondary institutions may

not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classroom and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright. Paragraph (c) of this section concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted. Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxilliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision. The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxilliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxilliary aid, the institution has flexibility in choosing the methods by which the aide will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge to order to reduce the number of readers needed for visually impaired students.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

H E A R I N G

BEFORE: THE HON. RYA W. ZOBEL
DISTRICT COURT JUDGE
UNITED STATES DISTRICT COURT

APPEARANCES:

Robert Leroux Hernandez, Esq., 6 Pleasant Street, Malden, MA 02148, on behalf of the Plaintiff.

Alan D. Rose, Esq., Nutter, McClennen & Fish, One International Place, Boston, MA 02110-2699, on behalf of the Defendant.

Courtroom No. 3
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
February 20, 1992

Barbara Sakurai - Official Court Reporter
1221 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Stenotype

* * *

[begins at p. 26]

MR. HERNANDEZ: Well, your Honor, there is evidence that we have that, with the assistance of a reader, and without timing, that probably he could pass. We believe that that is probably true. I am not saying here that is the best way to test him or the only way to test him, but it would appear that that would be a reasonable way to examine him.

THE COURT: So if Tufts were to allow him to take the examination, providing a reader and endless time, and he failed, he loses?

MR. HERNANDEZ: Yes, if that is a reasonable accommodation, and with that reasonable accommodation he cannot succeed.

THE COURT: You say, "if that is a reasonable accommodation." I am asking whether you are willing to tell me it is.

MR. HERNANDEZ: It sounds reasonable to me, your Honor, and it would sound reasonable, it seems, from the evidence before this Court that that would be a reasonable accommodation.

I mean certainly, as my brother points out, a lot of water has gone under the bridge, and there are — if we were told, "You are going to take your biochemistry exam with a reader tomorrow," I would suggest that might not be reasonable, but

taking into account reasonable preparation and so on, Mr. Wynne fully expects that he can pass this examination.

THE COURT: Just as a matter of curiosity, what is he doing now?

MR. HERNANDEZ: He works as a researcher at various universities.

The only other comment I would have is that the balancing test that the Appeals Court seems to be going through and struggling with, and which your Honor suggested may be somewhat ambiguous, is clearly a different one, because the principle of academic freedom is important and it is not proper for the Court to redefine how a school should do its business.

THE COURT: Particularly in the context of a professional school.

MR. HERNANDEZ: Certainly not. But to be weighed against that principle is the principle, of course, that there are developments in technology. There are better ways to test. There are ways of giving access to individuals today to professions and to kinds of meaningful work to which they might not have had access even ten or fifteen years ago. And, if the Court is going to honor the principles —

THE COURT: As of what point in time do I judge this?

MR. HERNANDEZ: As of today, your Honor.

THE COURT: Why?

MR. HERNANDEZ: Today a way to determine whether someone who suffers from dyslexia can make a good physician, despite his inability to take multiple choice tests, is: Is it

reasonable to ask that the institution allow him to do it that way? And that is all we are asking.

MR. ROSE: Your Honor, it seems to me that the remarks by Mr. Hernandez demonstrate the impracticality of the approach he is suggesting.

What I heard him say was that since the time this litigation began that he has concluded, presumably by working with people, that if Mr. Wynne took a written multiple choice exam and he had a reader, and it was untimed, maybe he could pass biochemistry test.

Now, is there any obligation on the part of the Court to look at the facts years later and listen to the plaintiff's attorney come into court five or six years after the fact and say, "Here is a way we could have passed the exam?" Tufts six years ago should have known there was a way he could have passed the exam, and, therefore, had to give him that kind of test."

THE COURT: In fairness to Mr. Hernandez, I don't understand that to be his argument.

MR. ROSE: It seems the relief he is going to be seeking is precisely that type of exam. He didn't request it at the time. It is not in his submission to the Appeals Committee.

Furthermore, your Honor, if that kind of approach is to be permitted, then anytime that a failing student fails, the last time, and is dismissed, then he can come along later and say, "Well, you know, I had a disability. I didn't tell you then that I had a speech disability, but I am telling you now I have a speech disability, and if you will just give me a new test that has just been come up with, I think I can pass it." I don't think that is the way the litigation ought to be conducted, your Honor. I think, in fairness to a university, particularly a

medical school, which believes it has serious obligations to the public to discharge, the facts need to be looked at through the prism of the way they appear at the time — the alternative he suggested. But, even if I am wrong, you have the affidavits before you which demonstrate that Tufts does not believe an oral exam would either be fair or feasible.

For those reasons, the judgement that Tufts made —

THE COURT: Why wouldn't the reader reading the questions be both fair and feasible?

MR. ROSE: We didn't consider that alternative at the time, your honor.

THE COURT: But you said nothing would be fair or feasible. That doesn't strike me as such a big deal.

MR. ROSE: The ground has shifted. Now for the first time in this courtroom — 1992 — he says, "I want a reader of a written exam." He has never said that before. He always said, "I want an oral examination."

THE COURT: Well, that, of course, raises the question as to who has to think up the alternatives.

MR. ROSE: That is right, and I believe there is an element of picking and choosing and deciding which exam you think you could pass, and then telling the Court. That is the only fair way to test him.

THE COURT: Excuse me. We talked about this for some length, which is partly why you are here, because I really am troubled about this case and what I should do. And Mr. Sorotkin suggests another question that I should ask you, and that is: Why would it not be an appropriate remedy to go back

and either order him reinstated to take the examination or anything like that, but simply to have Tufts now consider alternatives and say now that they can not give alternatives or they are unreasonably academically or whatever, or, yes they can, and these are it? Why should not that be the remedy?

MR. HERNANDEZ: Your Honor, the Court in its equitable jurisdiction could formulate such a remedy and I would suggest in order for that to work out there has to be some availability of discovery just so we can figure out what they are proposing and whether they are good or bad.

THE COURT: Why?

MR. HERNANDEZ: Because, under this record there is ample evidence that Tufts will fight tooth and nail to avoid reinstatement of Mr. Wynne, and if today they are asked the same question, they will give us the same answer, "Well, you know, there is no other physical way but to have a written examination."

THE COURT: You want the process. You will get the process.

MR. HERNANDEZ: We only ask that we have occasion to observe or participate in some way in that process or have some consideration to that process, your Honor.

THE COURT: Mr. Rose.

MR. ROSE: I am not aware of any precedent, your Honor, for the Court of Appeals' opinion. I am not aware of any.

THE COURT: I don't know of any precedent for the Court of Appeals' opinion either.

MR. ROSE: That is what I am suggesting. I think we should go ahead and follow what the Court of Appeals suggested we do. It has invited further submissions.

The question before the Court is whether Tufts arrived at a reasonable academic judgment at the time. The affidavits, it seems to me, suggest eminently that Tufts did so, and I believe the case should stop.

THE COURT: I will take the papers. Thank you both.

(Whereupon court was adjourned.)

CERTIFICATE

I, Barbara Sakurai, Official Court Reporter, United States District Court, do hereby certify that the foregoing is a true and accurate transcript of the proceedings taken down by me in machine shorthand in the aforementioned matter, to the best of my skill and ability, and that the proceedings were transcribed under my direction.

/Signed/_____